Supreme Court, U.S.
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No. 97-1147

In The

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA,

Petitioner,

vs.

WAYNE THOMAS CARTER AND MELVIN JOHNS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Minnesota

BRIEF IN OPPOSITION OF PETITIONER STATE OF MINNESOTA

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QUESTIONS PRESENTED

1. Does an invited guest of an apartment have standing to object to the police peering into the apartment without a warrant?

2. Does a police officer who enters private property, walks across the grass, climbs over bushes, crouches down and places his face 12 to 18 inches from a window in order to peep through a slight gap in drawn blinds conduct a search?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Wayne Carter and Melvin Johns respectfully request that the United States Supreme Court deny the petition for writ of certiorari seeking review of the decisions of the Minnesota Supreme Court in *State v. Carter*, 569 N.W.2d 169, 176 (Minn. 1997) and *State v. Johns*, 569 N.W.2d 180 (Minn. 1997).[1]

STATEMENT OF THE CASE AND THE FACTS

The Minnesota Supreme Court found the facts as follows:

> At approximately 8 p.m. on the evening of May 15, 1994, an anonymous informant approached Eagan police officer Jim Thielen. The informant, whom Thielen never had seen before, told Thielen that he/she[2] had walked by apartment 103 at 3943 South Valley View Drive and observed people sitting around a table inside the apartment "bagging" a white powder.

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[1] *State v. Carter* and *State v. Johns* are companion cases with identical facts and legal issues. The Minnesota Supreme Court discussed the issues and the facts in *State v. Carter*; in *State v. Johns* the court simply noted that the facts and issues were identical and reversed the conviction. *State v. Johns*, 569 N.W.2d at 181. Because the facts and issues are identical, respondents are filing just one brief in opposition.

[2] Thielen testified at the omnibus hearing that he spoke with the confidential informant for 15 to 25 minutes. He gave no further detail, however, about what their conversation involved, stating that to do so would reveal the informant's identity.

The informant also told Thielen that he/she believed the occupants of the apartment had used a blue four-door Cadillac located in the parking lot adjacent to the apartment complex. The informant also told Thielen that the car had an Illinois license plate that read SGD 896. In response to this information, Thielen went to the complex and approached the ground floor window of apartment 103. Thielen then walked toward the window of the apartment by leaving the common sidewalk that led to the apartment building's entrance and stepping on a grassy common area closer to the window. Thielen then walked behind some short bushes located in front of the apartment window and stood approximately 12 to 18 inches from the window. The window blinds were drawn closed, but gaps in the blinds allows Thielen to observe activity in the apartment. While looking through the gaps in the blinds, Thielen observed two males and one female sitting at a kitchen table. One of the males appeared to be placing a white powdery substance onto the kitchen table. This person then would pass the white substance to the second male who then would place the powder into a plastic bag. The second male, who was wearing bedroom slippers, would in turn give the plastic bag to the female who would cut off the ends of the bag and place it on the table.

After observing this activity for approximately 15 minutes, Thielen left the apartment complex and went to a nearby fire station where he had another conversation with the informant and another Eagan police officer. At this time the informant told the officers that the people inside the apartment might be in possession of a gun. Thielen then returned to the apartment

complex where he located a Cadillac matching the description given by the informant. He then returned to the fire station, telephoned Officer Kevin Kallestad of the South Metro Drug Task Force, and reported what he had seen. Kallestad instructed Thielen to stop and secure the suspect vehicle should anyone attempt to drive it away. Police also began to prepare affidavits as part of a request for warrants to search both the apartment and the Cadillac.

At approximately 10:30 p.m., an Eagan police officer observed two males putting items into the suspect Cadillac. The two males then entered the vehicle and started to drive it out of the parking lot. As per instructions, Eagan police stopped the vehicle at the intersection of Rahn Road and Beau de Rue Drive. The police found Carter in the driver's seat and Melvin Johns in the passenger's seat. The police ordered both men out of the car. As the police opened the door to let Johns out of the car, they observed a black zippered pouch and a handgun, later determined to be loaded, on the floor of the vehicle. The police then placed Carter and Johns under arrest. The police subsequently towed the Cadillac to the Eagan Police Department, and after receiving the signed search warrant at approximately 1:30 a.m. on May 16, the police searched the vehicle. When the officers opened the black zippered pouch, they discovered a white mixture in plastic baggies, Johns' identification, pagers, and a scale. Tests later determined that the white mixture was 47.1 grams of cocaine.

Later in the evening of May 15, after the arrests of Carter and Johns, Eagan police

returned to apartment 103 and arrested its occupant, Kimberly Thompson.[3] At approximately 3 a.m. on May 16, police executed a search warrant on the apartment and located cocaine residue on the kitchen table and plastic baggies consistent with those found in the automobile driven by Carter. Thielen subsequently identified Carter, Johns and Thompson as the individuals he had observed in the apartment packaging the white mixture. He identified Carter as the individual he had seen putting the white mixture on the table and dividing it into piles, Johns as the man who wore slippers and placed the piles into baggies, and Thompson as the individual who cut the ends off the baggies and placed the baggies in piles. Police ultimately learned that Carter and Johns were residents of Chicago, Illinois, and that Thompson was the sole lessee of apartment 103. Subsequent to his arrest, Carter made a statement to the police in which he admitted ownership of a duffel bag found inside the Cadillac. A search of the duffel bag uncovered a digital gram scale containing traces and residue of cocaine. Johns made a statement to police admitting he had accepted a proposal to transport cocaine from Illinois to Minnesota for money, and that he, Carter and Thompson had packaged the cocaine at Thompson's apartment. He also admitted that there were approximately two ounces of crack cocaine and a handgun in the vehicle.

State v. Carter, 569 N.W.2d at 171-173.

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[3] Thompson was a co-defendant in the omnibus hearing. She subsequently pled guilty and is not a party to this appeal.

Both Carter and Johns filed motions to suppress their statements and the evidence seized as a result of Theilen's actions. The trial court found that respondents did not have standing to contest Theilen's actions. *State v. Carter*, 569 N.W.2d at 173.

Following the district court's denial of their motion to suppress, Carter and Johns were found guilty, in separate trials, based on stipulated facts. Carter appealed to the Minnesota Court of Appeals which concluded that Carter did not have standing to object to the search. *State v. Carter*, 545 N.W.2d 695, 698 (Minn. Ct. App. 1996), *reversed* 569 N.W.2d 169 (Minn. 1997).

Johns also appealed to the Minnesota Court of Appeals. The court of appeals affirmed the trial court; however, the court of appeals did not address the standing issue. Instead, the court of appeals concluded that no Fourth Amendment violation occurred. *State v. Johns*, C9-95-1765 (Minn. Ct. App. June 11, 1996), *reversed* 569 N.W.2d 180 (Minn. 1997).

The Minnesota Supreme Court accepted review of both cases. The Minnesota Supreme Court held that Carter and Johns had standing to object to the legality of Theilen's actions because "society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task." *State v. Carter*, 569 N.W.2d at 176.

The supreme court went on to hold that Thielen's conduct constituted a search and, because Thielen did not have probable cause or a warrant, the search violated Carter and Johns constitutional rights. *Id.* at 178.

REASONS FOR DENYING PETITION

There are no sound reasons for granting certiorari in this case, much less the "compelling reasons" required by this Court. The decision of the Minnesota Supreme Court relies on well-established precedent from this Court and, contrary to the State's assertions, charts no new territory.

I.

THE MINNESOTA SUPREME COURT, RELYING ON WELL-ESTABLISHED PRECEDENT FROM THE UNITED STATES SUPREME COURT, CORRECTLY HELD THAT AN INVITED GUEST OF AN APARTMENT HAS STANDING TO OBJECT TO THE POLICE PEERING INTO THE APARTMENT WITHOUT A WARRANT.

"[T]he Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). "[T]he protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." *Mancusi v. DeForte*, 392 U.S. 354, 368 (1968).

In determining who has standing to claim the protections of the Fourth Amendment, the determinative question is "whether the person who claims the protection has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). "A subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable." *Minnesota v. Olson*, 495 U.S. 91, 95 (1990) (citations omitted).

Before *Rakas v. Illinois*, the determinative question was whether a person was "legitimately on the premises." *See Jones v. United States*, 362 U.S. 257 (1960). Petitioner claims that the Minnesota Supreme Court "has reverted back to the 'legitimately on the premises' standard specifically rejected under *Rakas* and *Olson*." Petitioner's petition for certiorari, p. 17. The Minnesota Supreme Court did not use the "legitimately on the premises standard;" rather, the court set out the proper standard and then came to the unremarkable conclusion that "society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task." *State v. Carter*, 569 N.W.2d 169, 176 (Minn. 1997).

In setting out the law, the Minnesota Supreme Court obviously relied on the appropriate standard; the court specifically stated that being legitimately on the premises is not sufficient to establish standing. *State v. Carter*, 569 N.W.2d at 176, n. 8. In addition, the court quoted at length from the two cases petitioner claims the court ignored:

> The question before us, therefore, is whether Carter had a legitimate expectation of privacy in Thompson's apartment.
>
> A defendant has a legitimate expectation of privacy when his or her subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" *Rakas v. Illinois* at 143-144, n. 12 (quoting *Katz v. United States*, 389 U.S. at 361 (Harlan, J. concurring)). In other words, a criminal defendant must make two showings to establish that he or she based the motion to suppress upon an alleged violation of

> his or her individual Fourth Amendment right. First, he or she must show a subjective expectation of privacy, and second, he or she must show that this expectation was reasonable in light of "longstanding social customs that serve functions recognized as valuable by society." *Olson*, 495 U.S. at 95.

State v. Carter, 569 N.W.2d at 176.

After setting out the proper standard, the Minnesota Supreme Court painstakingly reviewed the record to determine whether respondents met that standard. *State v. Carter*, 569 N.W.2d at 174-176. After its painstaking review, the court concluded that respondents had the leaseholder's permission to be inside the apartment and that they remained inside the apartment for at least 2½ hours, during which time they worked with the leaseholder on a common task. *State v. Carter*, 569 N.W.2d at 176. The court then held that "society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task." *Id.*

The Minnesota Supreme Court's holding is consistent with this court's holding in *Rakas v. Illinois* and *Minnesota v. Olson*. It is not necessary for the United States Supreme Court to accept review simply to affirm its holdings in *Rakas v. Illinois* and *Minnesota v. Olson*.

Petitioner also suggests that this Court should accept review because the Minnesota Supreme Court decided an "important question of federal constitutional law." Respondent's brief, p. 17. The important federal question purportedly decided by the Minnesota Supreme Court

was whether a person has standing when the sole purpose for his presence in the residence is to engage in illegal activities.

There are a number of problems with this claim.

First, petitioner did not argue the legality or illegality of respondents' conduct at the trial court and therefore waived this issue. Petitioner must not be allowed to present an argument to this court that it did not present to the trial court.

Second, the Minnesota Supreme Court did not address the legality or illegality of respondents' conduct in determining that they had standing to object to the search. Instead, the court based its conclusion on three factors: (1) respondents had the leaseholder's permission to be inside the apartment; (2) respondents remained inside the apartment for at least 2½ hours; and (3) while respondents were in the apartment, they worked with the leaseholder on a common task. *State v. Carter*, 569 N.W.2d at 176. The court then held that "society does recognize as valuable the right or property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task." *Id.*

The third problem with petitioner's claim is that there is no split of authority concerning this issue. While there is the odd, in both sense of the word, case that has held that one is not entitled to standing if the presence was for the purpose of engaging in criminal conduct, *see, e.g., State v. Keeling*, 182 N.E.2d 60 (Ohio Com.P. 1962), none of the federal cases cited by petitioner stand for this proposition.[4]

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[4] Petitioner cites four federal cases that purportedly support the proposition that one is not entitled to standing if his

The final, and most important, problem with petitioner's theory is that it is untenable; "to deny standing merely because it turns out the defendant had a criminal purpose is in sharp conflict with the rationale underlying the exclusionary rule." 5 W. LaFave, *Search and Seizure A Treatise on the Fourth Amendment* 145 (3rd Ed. 1996).

The primary purpose of the exclusionary rule is to deter the police from conducting unreasonable searches and seizures. "The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

If a defendant who engaged in illegal conduct did not have standing to object to the police invasion of his privacy, the police would have no incentive to abide by the Fourth Amendment. The police could simply raid a home or an office in the hopes of finding something incriminating. If the police find something incriminating,

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presence was for the purpose of engaging in criminal conduct; none of the cases stand for this proposition. Instead, the federal courts, like the Minnesota Supreme Court, simply examined the defendants' connections to the place being searched. *See, e.g., United States v. Garcia*, 741 F.2d 363, 366 (11th Cir. 1984) (court held that the defendant did not have standing because "[h]is contacts with the apartment, at least on the evidence appearing in the record, were not regular or personal enough to establish an expectation of privacy"); *United States v. Hicks*, 978 F.2d 722, 724 (D.C. Cir. 1992) (court held that the defendant did not have standing because the defendant simply established that the tenant permitted his presence, nothing more).

the citizen would not object because he had been engaging in illegal conduct. And if the police do not find anything incriminating, there is "no practical redress" for the invasion of one's personal liberty, even if innocent. *Id.* at 217. The result would be many more unlawful searches and seizures.

Respondent had a legitimate expectation of privacy in the apartment where they were staying. Accordingly, they had standing to object to the police invasion of that privacy.

II.

THE UNANIMOUS DECISION OF THE MINNESOTA SUPREME COURT – THAT A POLICE OFFICER WHO ENTERED PRIVATE PROPERTY, WALKED ACROSS THE GRASS, CLIMBED OVER BUSHES, CROUCHED DOWN AND PLACED HIS FACE 12 TO 18 INCHES FROM A WINDOW IN ORDER TO PEEP THROUGH A SLIGHT GAP IN DRAWN BLINDS IS CONDUCTING A SEARCH IS NOT CONTRARY TO ANY DECISION OF THIS COURT.

Respondents were in a garden level apartment when their activities were observed by a police officer through a window to that apartment. The state has argued that ruling that this observation, made by an officer's unaided sight, is not a search. *See* Petitioner's petition at 24-28. As noted by the Minnesota Supreme Court, the officer did not simply go to an area normally traversed by people walking in the common area of this apartment building,

the officer went to a place where no one goes (without engaging in the illegal act of window-peeping[5]):

> It was only after [the officer] left the sidewalk, walked across the grass, climbed over some bushes, crouched down and placed his face 12 to 18 inches from the window that [the defendants'] activities became observable.

Carter, 516 N.W.2d 169 (Minn. 1997). The state has argued that the police officer's actions were actually a "minor" intrusion when compared to other police intrusions sanctioned by this court. *See* state's petition at 28. This court has never sanctioned this sort of an intrusion; the state cites only *Katz v. United States*, 389 U.S. 347 (1967), *Florida v. Riley*, 488 U.S. 445 (1989), and *California v. Ciraola*, 476 U.S. 207 (1986) in support of the dubious contention that this court has sanctioned the window-peeping in this case. *Ciraola* and *Riley* did not involve any entry upon private property by the officers involved; the officer in this case entered onto private property and climbed over bushes intended to provide the inhabitants of that private property with some level of privacy. And *Katz*, of course, involved the improper use of devices used by officers to

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[5] The officer's behavior is against the law in Minnesota; it is commonly called window-peeping.

Interference with privacy:

> Any person who enters upon another's property and surreptitiously gazes, stares, or peeps in the window of a house or place of dwelling of another with intent to intrude upon or interfere with the privacy of a member of the household thereof is guilty of a misdemeanor.

Minn. Stat. § 609.746 (1996).

enhance their senses; to see and hear things they normally could not.

This court has never upheld anything close to the window-peeping present in this case; the Minnesota Supreme Court's unanimous ruling in this respect is hardly contrary to any decision of this court, and certiorari as to this issue should be denied.

CONCLUSION

The Minnesota Supreme Court held that: (1) an invited guest of an apartment has standing to object to the police peering into the apartment without a warrant; and (2) a police officer who entered private property, walked across the grass, climbed over bushes, crouched down and placed his face 12 to 18 inches from a window in order to peep through a slight gap in drawn blinds, is conducting a search. Both conclusions are supported by

well-established precedent from this Court. Accordingly, the State's petition for writ of certiorari should be denied.

Respectfully submitted,

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